ALLIANCE BUILDING FOR A CULTURE OF COMPLIANCE: COUNTERING WEAKNESSES IN COMPETITION LAW ENFORCEMENT

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The New York University study

What weaknesses are attributable to design, procedure, process?
- Agency effectiveness
- Court effectiveness

How alliance-building can help
NYU Study on Global Process Norms: country studies, cross-country comparisons

- The Global Administrative Law project
- Our sample jurisdictions
  - Mature
    - United States
    - Canada
    - Australia/New Zealand
    - European Union
    - Japan
  - Newer and evolving: China, Chile, South Africa
- International
- The norms
  - E.g. Rule of law, predictability, timeliness, expertise, transparency, reason-giving, right of participation and review; in general accountability and legitimacy
- Findings
II Highlighting common flaws that impair effectiveness: a. Agency level-poor outcomes attributable to:

- Lack of independence
- Lack of funding, technical expertise
- Lack of management skill
- Conflicts of interest within agency
- Flaws in the legislation
  - Imprecise proscriptions
  - Weak discovery powers, inadequate sanctions
  - Immunities, non-coverage
  - Lack of private rights
    - and the agency must handle all complaints
- Lack of the wherewithal to uncover and the power to catch and remedy the worst restraints
b. Court level – poor outcomes attributable to:

- Corruption
- Incompetence - delays and lack of expertise
- Powerful tools for delay in hands of defendant
  - Mexican amparo
- Systemically unsympathetic appellate courts
  - Specialized appeals court - Asset or liability? (So. Africa)
- Insufficient deference
  - De novo power of review  South Africa
- Excessive avenues for appeal
III Alliance building

a. agency effectiveness

- Combatting problems of lack or loss of highly qualified staff
  - This takes funding and training
    - (also it takes an attractive agency in terms of leadership, focus, inspiration)
    - Alliances: universities, development funds, sister authorities, NGOs, other capacity builders (ICN, OECD, UNCTAD)
- Combatting design in which persons with conflicts of interest sit on boards that authorize cases
  - This takes legislative and executive leadership
    - which by definition is lacking
  - Alliances: This needs publicity; becoming a public cause
Combatting flaws in statutory law that make cases excessively hard to prove, that give insufficient powers of discovery and sanction, that immunize worst restraints, that give no private rights

- This takes legislative change
- Alliances to educate and persuade the legislature:
  - Press, NGOs, academics

Combatting lack of independence

- Partly a legislative design problem that could in theory be cured by separation from executive control; but pressure exists even if the agency is called “independent”
  - Partners: press, sunlight, courage
Lack of practical means
- to catch and remedy some of the worst restraints
- E.g., international cartels and MNEs that hurt the nation’s people
  - It is hard for developing countries to recover
    - It is extremely hard if the victims are all in developing countries; e.g. the Canadian potash export cartel
- Alliances:
  - Developing countries similarly victimized
  - Developed countries, especially homes of the cartelists, OUGHT to be allies – can they be convinced?
  - Bilateral, regional agreements, OECD, UNCTAD
Getting the information

Allies: It is worth noting that leniency programs foster alliances with the agency
- The leniency applicant is an ally
- Leniency programs destabilize cartels by incentivizing individuals with knowledge

Lawyers who advise on compliance

Big buyers who are constantly exploited
- and their lawyers steel in South Africa

What lessons can we learn for giving stronger incentives to become agency allies?
Corruption, inefficiency, delay, no expertise

Allies: court reformers

- Urgency of court reform to eliminate corruption, ineptitude
  - This is well appreciated
    - World Bank, InterAmerican Development Bank, other banks
    - Common rationale is the de Soto/Hobbes property/contract rights rationale
  - But it is not yet appreciated by court reformers that:
    - Good courts are essential for agency effectiveness
      - Otherwise, what is done is constantly undone

Other allies:

- Sister agencies in all fields of law
- Development banks
- Universities and trainers of judges
- Bar associations, plaintiffs’ bar
- NGOs against corruption and for consumers
Can the design of decision-making and appellate process be improved?
- Is one design weaker or stronger than another
  - Separation or not of prosecutorial/judging
  - Rights of cross-examination
  - Specialized (expert?) decision-makers
  - Due process and undue process cf. Mexican amparo

These problems are much debated
- Perhaps there are some “right answers” but not always

Allies in solving
- Sunlight, debate
  - to inform the jurisdiction, which is likely to adjust consistent with its needs and possibilities and global norms
Agency effectiveness can be increased in many ways; not least through alliances.

Modus operandi: to catalog the points of weakness and explore how alliances can help, as we have done.

We observe that agency effectiveness is not only a function of what the agency does and how it does it, but what happens after the agency acts: the court process.

Thus court ineffectiveness is a problem of agency ineffectiveness.

Alliance-building can be a part of the solution.

How to build alliances is a fruitful subject of future work, perhaps through ICN.